

# Oxford Public International Law



## Unjust Enrichment

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## A. Notion

**1** The concept of unjust or unjustified enrichment has been defined as 'adjusting shifts of assets from one person to another which are at variance with the final allocation of assets envisaged by the law' (Zweigert and Müller-Gindullis 4). The Iran-United States Claims Tribunal ('Iran-US Claims Tribunal'), in *Sea-Land Service Inc. v Iran* ('*Sea-Land*'), summarized the characteristics of unjust enrichment as follows:

There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched (*Sea-Land* 6 Iran-US Claims Tribunal Reports [Grotius Cambridge 1986] 149, 169).

**2** A comparative analysis of domestic laws reveals (General Principles of Law; see also paras 10–11 below) that the concept is a recurrent phenomenon. While the terminology used is by no means uniform, it can be said that these rules and remedies are designed to redress undesirable shifts of control over assets which are not covered by other areas of the law. Typically, a situation giving rise to liability for unjust enrichment would therefore be covered neither by responsibility for a wrongful act (see paras 30–33 below) nor by an underlying valid agreement (see paras 28–29 below).

**3** A second important characteristic of unjust enrichment lies in the computation of the remedy to be awarded. The achievement of an acceptable economic equilibrium is sought not by compensating the losses of the deprived person, such as with damages for wrongful acts, but rather by depriving the enriched party of its unjustly gained benefits, which are then awarded to the other party or parties.

**4** Beyond this very general description, unjust enrichment remains an elusive legal phenomenon, combining ostensible mathematical simplicity with a high degree of legal ambiguity. The main problem is, of course, to define under what circumstances enrichment must be regarded as unjust or unjustified. There is no doubt that there are numerous transactions aimed at the enrichment of one party at the cost of another which are perfectly legitimate. The crucial question is the existence or non-existence of a 'just cause'. Any rule against unjust enrichment cannot be applied without reference to a set of legal principles which determine whether in fact there has been such a just cause. Therefore, the principle against unjust enrichment is in the nature of a remedy rather than of a rule. In terms of the law of State responsibility its character is not primary but at best secondary.

## B. Foundation in International Law

### 1. Treaty Law

**5** Some treaty provisions reflect the concept of unjust enrichment. For instance, several conventions dealing with the protection of cultural property contain provisions regarding the restitution of such property to the country of origin. Where this obligation to return does not arise out of wrongful conduct such provisions may be considered as inspired by the concept of unjust enrichment (see eg Art. 1 (3) and Art. 2 (5) 1954 Protocol to the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict; Cultural Property, Protection in Armed Conflict).

**6** Restitutionary remedies might be applied with respect to treaties in general. Arts 69, 70 and 71 Vienna Convention on the Law of Treaties (1969) ('Vienna Convention') dealing with the consequences of the invalidity and termination of treaties do not supply answers to all questions

concerning their economic consequences (Treaties, Validity; Treaties, Termination).

**7** According to Art. 69 Vienna Convention, acts performed in good faith (*bona fide*) under a treaty which is later found to be invalid are not rendered unlawful. A benefit thus obtained may therefore give rise neither to a claim arising from the treaty itself nor to remedies for unlawful acts. The solution provided is a *restitutio in integrum* 'as far as possible'. Where restitution in kind is impossible, some adjustment balancing losses and benefits will have to take place. Where the losses of one side are not identical to the gains of the other side, the problem arises whether the damages incurred or the amount of unjust gain is the appropriate basis for determining the restitutionary remedy. Since damages are normally associated with illegal acts, it is more appropriate to interpret Art. 69 (2) Vienna Convention as a reference to restitution of unjustly gained benefits.

**8** Art. 70 Vienna Convention, dealing with the termination of a treaty, releases the parties from any further obligation to perform the treaty, but at the same time provides that 'any right, obligation or legal situation of the parties' created through the previous execution of the treaty will not be affected. In the case of an unbalanced partial execution of the treaty, one side may have obtained benefits to the detriment of the other. A right to adequate consideration can hardly be based on a treaty which has been terminated. Here, too, the surrender of the actual increase of wealth obtained through the frustrated transaction in accordance with principles of unjust enrichment appears to be the appropriate solution.

## 2. Customary Law

**9** There is substantial practice, especially of international arbitral tribunals, concerning claims based on unjust enrichment (arbitration; Claims, International; International Courts and Tribunals). However, the fact that tribunals have applied that concept in a number of cases does not demonstrate that there is a general 'rule' against unjust enrichment. Rather, the different types of factual situations to which the concept of unjust enrichment has been applied (see paras 13–26 below) seem to be too varied to form a meaningful basis for such a concept in customary international law.

## 3. General Principles of Law

**10** The prohibition of unjust enrichment is frequently cited as a typical example of a general principle of law. In particular in international arbitral awards, unjust enrichment has been specifically referred to as one of the general principles of law in the sense of Art. 38 1(c) Statute of the International Court of Justice ('ICJ Statute'; see also International Court of Justice). Examples include the dissenting opinion of Judge Spiropoulos to the *Ambatielos* Award of 6 March 1956 (*Ambatielos [Dissenting Opinion Judge Spiropoulos]* [1956] 12 RIAA 83, 129; *Ambatielos Case*), the *Libyan American Oil Company ('LIAMCO')* Award of 12 April 1977 (*LIAMCO v Government of the Libyan Arab Republic* [12 April 1977] 62 ILR 141, 175–76) and a number of awards of the Iran-US Claims Tribunal (*Flexi-Van Leasing, Inc. v Iran* 12 Iran-US Claims Tribunal Reports [Grotius Cambridge 1988] 335, 353; *Schlegel Corp. v NICIC* 14 Iran-US Claims Tribunal Reports [Grotius Cambridge 1988] 176, 180; *Sea-Land* 6 Iran-US Claims Tribunal Reports [Grotius Cambridge 1986] 149, 168; *Shannon & Wilson, Inc. v AEOI* 9 Iran-US Claims Tribunal Reports [Grotius Cambridge 1987] 397, 402). Also in an UNCITRAL arbitration (see United Nations Commission on International Trade Law [UNCITRAL]) unjust enrichment was recognized as general principle of law (*Saluka Investments BV [The Netherlands] v Czech Republic [Partial Award of 17 March 2006]* para. 449 <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1149](http://www.pca-cpa.org/showpage.asp?pag_id=1149)> [6 August 2008]).

**11** A comparative analysis seems to support the assumption that there is a general principle of law against unjust enrichment. Certain provisions dealing with problems of unjust enrichment can be found in many, perhaps all legal systems. Some legal systems have clear statutory provisions

providing for restitution in cases involving unjust enrichment, while others have developed different legal remedies to deal with similar situations. As to the concrete content of the concept, however, no real guidance can be found in the different legal systems which represent a multitude of often technical rules. The question as to which situations, arising in international law contexts, this general principle of law should be applied, remains unanswered by a comparative analysis. Accordingly, the problem with accepting unjust enrichment as a general principle of law is that it is not based on a unitary legal concept. The crucial answer to what is 'unjust' or constitutes 'lack of just cause' differs widely. Hence, unjust enrichment may be no more than a remedy, which leaves the concept's scope of application to be determined by international practice.

#### 4. Equity

**12** Exceptionally, the source of unjust enrichment was also found in equity (Equity in International Law). Especially in separate or dissenting opinions, judges and arbitrators referred to the principle of unjust enrichment on the basis of general notions of justice and equity (see eg *Ambatielos* [Dissenting Opinion Judge Spiropoulos] [1956] 12 RIAA 83, 128–29; *Chas T. Main v Mahab* [Concurring Opinion Judge Mosk] 3 Iran-US Claims Tribunal Reports [Grotius Cambridge 1984] 270, 279; *Shannon & Wilson, Inc. v AEOI* 9 Iran-US Claims Tribunal Reports [Grotius Cambridge 1987] 397, 402).

### C. International Practice—Areas of Application

#### 1. Unjust Enrichment in Crisis Situations of a Political Kind

**13** In international adjudication, the principle of unjust enrichment has been invoked in a number of different situations. Applications of the principle include cases involving infringements of the property rights of foreigners which do not amount to international wrongful acts. In general crisis situations, States are sometimes permitted to take exceptional measures interfering with individual rights without incurring State responsibility. One such type of situations concerns the seizure of private property in times of war for the use of an army. In these cases, the seizure as such was not contrary to the laws of war and there was consequently no claim for damages. However, the armed forces had made use of the private property and had obtained a benefit there at the cost of the owners. In situations of this kind, arbitral tribunals have repeatedly awarded compensation on the basis of unjust enrichment to the extent that the armed forces had actually benefited from the use of the private property (*Thomas C. Baker v Mexico* in JB Moore [ed] *History and Digest of the International Arbitrations to which the United States Has Been a Party [...]* [Government Printing Office Washington 1898] vol 4, 3669; *Case of Putegnat's Heirs* ibid vol 4, 3718; *Compagnie des Chemins de Fer du Nord c. Etat Allemand* [1929–30] 9 TAM 67, 75; *Sucrerie de Roustchouk c Etat Hongrois* [1926] 5 TAM 772; *The Edna* [1940] 34 AJIL 737, 747; see also Requisitions).

**14** Another group of cases in which unjust enrichment was applied concerned contracts dissolved by the outbreak of war that had only been partly performed. This partial performance had led to one-sided wealth transfers to the benefit of one party. The mixed arbitral tribunals, set up after World War I, repeatedly applied the principle against unjust enrichment in this context. They held that the contracts in question had been terminated by the peace treaties after World War I but nevertheless granted restitution based on unjust enrichment to remedy situations of this kind. They compelled parties that had received part performance under such contracts to make restitution to the extent such part performance was not balanced by appropriate consideration (*Delcroix v Fritzsche et Cie.* [1924] 3 TAM 291; *Burroughs Wellcome & Co. v Chemische Fabrik auf Actien* [1927] 6 TAM 13; *The Dunderland Iron Ore Co. Ltd v Friedrich Krupp A.G.* [1927] 6 TAM 639; *Leslie Caro v Norddeutscher Lloyd* [1927–28] 7 TAM 398; *Direction Generale des Ports et Voies de Communication par Eau v A. Schwartz et Cie.* [1927–28] 7 TAM 738; *Didier v Cohn et Pink* [1928–29] 8 TAM 800; *Iraq Petroleum Co. Ltd v Deutsche Bank & Disconto Ges.* (1929–30) 9 TAM 478).

## 2. Unjust Enrichment and State Succession

**15** The doctrine of unjust enrichment has also been used in situations of State succession where the successor State had come into the possession of benefits at the cost of a party who had undertaken improvements on the territory in question without being able to pursue his claim against the original principal (State Succession in Treaties; State Succession in Other Matters than Treaties). There are decisions by the Austrian Supreme Court (*German Railways in Austria* Oberster Gerichtshof Österreich [Austrian Supreme Court] [1948] SZ 21/60) and by the Supreme Court of Poland (*Zilberszpic v [Polish] Treasury* [1927–28] 4 AnnDig 82) to this effect. Claims based on unjust enrichment in situations of State succession were, however, denied where the benefits in question did not accrue directly to the State (*Koranyi v Etat Roumain* [1928–29] 8 TAM 980) or where the successor State had made payment for the properties taken over (*Niedzielskie v [Polish] Treasury* [1925–26] 3 AnnDig 74).

## 3. Unjust Enrichment and Expropriation

**16** By far the most intensive debate on the applicability and usefulness of a concept of unjust enrichment in international law has taken place in the area of compensation for expropriation of foreign-owned property. The adherents of the ‘adequate, prompt and effective’ compensation concept have used it as an additional argument to support the demand for full compensation in favour of the expropriated foreign investor. Conversely, the supporters of nationalization policies in capital importing countries have used unjust enrichment to point to the traditional situation of exploitation and unequal treaties. In their view, the principle should be applied chiefly against the foreign investors to set off what those countries regard as unfair profits made in the past. The point is perhaps best illustrated by the attempt of the government of Chile to deny compensation to the former owners of the copper industry in the country, expropriated in 1971–72, by offsetting ‘excess profits’. A third school of thought has tried to strike a compromise between the two extreme positions by using unjust enrichment to bridge the gap between the concepts of the economically developed and the underdeveloped nations. This view would use unjust enrichment to explain partial compensation, taking the benefits of both sides into account. In view of these diverse positions it is doubtful whether the concept of unjust enrichment will contribute much to the general debate on the legal basis of a duty to compensate. At best, unjust enrichment might play a certain role in the complex task of determining the appropriate amount of compensation for an expropriation which is not otherwise illegal. It may be useful as just one of several factors in balancing the past and future benefits and losses of each side within a particular context (*LIAMCO v Government of the Libyan Arab Republic* [12 April 1977] 62 ILR 141, 144, 175–76, 213). However, in a decision of the Iran-US Claims Tribunal, the usefulness of the theory of unjust enrichment for the determination of the obligation to compensate is rejected in case of a lawful expropriation (*Amoco International Finance Corp. v Iran* 15 Iran-US Claims Tribunal Reports [Grotius Cambridge 1988] 189, 268–69).

## 4. Unjust Enrichment as Applied by the Administrative Tribunals of International Organizations

**17** Unjust enrichment has also been used occasionally by the administrative tribunals of international organizations in cases relating to the respective financial obligations of employees and the secretariat (*Schumann v Secretariat of the League of Nations* [1933–34] 7 AnnDig 461; *Wakley v World Health Organization [WHO]* [6 October 1961] 32 ILR 466).

## 5. Unjust Enrichment and State Contracts with Individuals or Corporations

**18** Sometimes State contracts with individuals or corporations turn out to be unenforceable or

invalid in circumstances under which the international responsibility of the State concerned is not involved. Where a demonstrable benefit has accrued to the State, it has been held repeatedly that restitution to the extent of the actual enrichment should be made. This principle was applied to agreements found void because they had been concluded by State agents who lacked the necessary authority to contract (*William A Parker [US] v United Mexican States* [1926] 4 RIAA 35). In a similar vein a State which had validly terminated a contract was found liable to pay on the basis of *quantum meruit* for the benefits gained thereunder (*Landreau Claim* [1922] 1 RIAA 352, 364). Also in *Société d'Investigation de Recherche et d'Exploitation Minière (SIREXM) v Burkina Faso* [Award of 19 January 2000] (ICSID Case No ARB/97/1 <<http://icsid.worldbank.org/ICSID/FrontServlet>> [5 August 2008]) unjust enrichment was awarded to the company in case of a State contract nullified for fraud as compensation for the investments made thereunder (see also paras 35–36 below). However, tribunals have also rejected claims based on unjust enrichment; this in particular because they considered the potentially enriched entity as legally different from the respondent State (see eg *Amco Asia Corp. and others v Republic of Indonesia* [Resubmitted Case: Award of 5 June 1990] ICSID Case No ARB/81/1 [1990] 1 ICSID Rep 569, 607–608); see also para. 34 below; *Amco v Indonesia* Case). In *Zhinvali Development Limited v Republic of Georgia* (*Zhinvali Development Limited v Republic of Georgia* [Award of 24 January 2003] ICSID Case No ARB/00/1 [2003] 10 ICSID Rep 3, 54–55) the claimant relied on unjust enrichment with reference to Georgian national law. As the tribunal declined jurisdiction it did not pronounce itself on the issue.

## 6. Unjust Enrichment as a Defence

**19** Sometimes respondents have relied on claimants' alleged unjust enrichment as a defence to reduce the amount of compensation to be awarded. Relevant cases include: *CMS Gas Transmission Company v the Republic of Argentina* ([Award of 12 May 2005] ICSID Case No ARB/01/8 paras 218–20); *LG&E v Argentina* ([Award of 25 July 2007] ICSID Case No ARB/02/1 paras 26, 58); *American Manufacturing & Trading, Inc. v Zaire* ('*AMT v Zaire*'; [Award of 21 February 1997] ICSID Case No ARB/93/1); *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* ([Award of 20 May 1992] ICSID Case No ARB/84/3 paras 245–47); and *Zeevi Holdings v Bulgaria and the Privatization Agency of Bulgaria* ([Final Award of 25 October 2006] UNCITRAL Arbitration Case UNC 39/DK). With the exception of *AMT v Zaire*, where the tribunal used unjust enrichment as a mitigating factor that 'should be taken into account in the event that any compensation is awarded in this case' (para. 7.15) and *Zeevi Holdings*, where the Tribunal considered the respondent's counterclaim in reliance on unjust enrichment as admissible in principle (para. 860), reliance on unjust enrichment as defence was generally rejected in these cases.

## 7. Unjust Enrichment Before the Iran–United States Claims Tribunal

**20** The concept of unjust enrichment has been particularly popular before the Iran-US Claims Tribunal. The relevant cases mostly involve private law transactions. The international dimension is provided by the fact that one of the parties is a State or a government enterprise and the other party a foreign national, by the fact that the tribunal applied general principles of law, and by the international nature of the tribunal.

### (a) Acceptance of Unjust Enrichment Claims

**21** In an early case before the Iran-US Claims Tribunal, *Benjamin Isaiah v Bank Mellat* (*Benjamin Isaiah v Bank Mellat* 2 Iran-US Claims Tribunal Reports [Grotius Cambridge 1984] 232, 235–39) the claim for unjust enrichment of the beneficial owner of a cheque drawn on the respondent bank's predecessor but subsequently dishonoured for insufficient funds was admitted. Also in other tripartite or multi-party relationships—with the exception of those concerning sub-contractors—the claimant was allowed to rely on unjust enrichment. While a general legal interest or also material

loss was not considered sufficient to pursue a claim under a contract when the contract had been concluded between other parties, a claim for unjust enrichment was generally admitted when the respondent was enriched at the expense of the claimant. For instance, in *Alfred Haber v Iran* (23 Iran-US Claims Tribunal Reports [Grotius Cambridge 1991] 133, 146–47), Haber, a US corporation which arranged for the conclusion of license agreements between American producers and National Iranian Radio and Television ('NIRT'), was allowed to bring an unjust enrichment claim for services rendered and material provided which was not returned. (A claim based on contract was not possible as Haber was not a party to the contract between NIRT and the American producers.)

**22** Furthermore, the Iran-US Claims Tribunal admitted claims based on unjust enrichment in cases where goods were delivered, services rendered or assistance provided without a direct contractual bond between claimant and respondent but within a mutual understanding that the respondent needed and accepted these benefits. When work was performed without a contract, but in promise of a future contract, the tribunal awarded unjust enrichment (*W Jack Buckamier v Iran* 28 Iran-US Claims Tribunal Reports [Grotius Cambridge 1996] 53, 85–87). Likewise, in *Morrison-Knudsen Pacific Ltd v The Ministry of Roads and Transportation*, the tribunal awarded compensation for services rendered which had been requested by the correspondent ministry. The work performed was not covered by the original contract. However, as the ministry had requested and accepted the additional work, the claimant was awarded a 'reasonable sum for such work on the basis of *quantum meruit*' (*Morrison-Knudsen Pacific Ltd v The Ministry of Roads and Transportation* 7 Iran-US Claims Tribunal Reports [Grotius Cambridge 1986] 54, 76). Likewise, in *Futura Trading, Inc. v Khuzestan Water and Power Authority* 9 Iran-US Claims Tribunal Reports [Grotius Cambridge 1987] 46, 56–58), the respondent was held responsible to pay for the services rendered in view of an intended contract which had however never been concluded. In *DIC of Delaware Inc. v Tehran Redevelopment Corp.*, the tribunal awarded damages on a *quantum meruit* basis after finding that there was 'no contract sufficiently definite to be enforceable' 8 Iran-US Claims Tribunal Reports [Grotius Cambridge 1987] 144, 161) for the work that had been done and for which compensation was claimed. In *Uiterwyk Corporation v Iran*, the Iran-US Claims Tribunal awarded restitution based on unjust enrichment for the assistance provided by Uiterwyk at the request of the respondents which was not covered by any agreement (19 Iran-US Claims Tribunal Reports [Grotius Cambridge 1989] 106, 139, 142, 146–48, 150–52).

**23** In *Mobil Oil Iran Inc. v Iran* (*Mobil Oil Iran Inc. v Iran* 16 Iran-US Claims Tribunal Reports [Grotius Cambridge 1988] 3, 19), the tribunal allowed recovery of capital advances and products not returned on the ground of unjust enrichment which had been made under an agreement which was subsequently revoked after disputes about its implementation. In *Sea-Land* (6 Iran-US Claims Tribunal Reports [Grotius Cambridge 1986] 149, 168–73, 177, 213–16) a substantial investment had been made by the claimant under a 'facility agreement' which had subsequently collapsed. The tribunal awarded restitution on the basis of unjust enrichment to the extent of the respondent's subsequent actual use of the facility.

### **(b) Denial of Unjust Enrichment**

**24** The Iran-US Claims Tribunal generally rejected claims to unjust enrichment by subcontractors against the party to the main contract inter alia with the arguments that the enrichment did not 'ar[i]se as a consequence of the same act or event' and that the enrichment had not been sufficiently direct (see eg *SeaCo., Inc. v Iran*, 28 Iran-US Claims Tribunal Reports [Grotius Cambridge 1996] 198, 205–8; see also *Chas T. Main v Mahab* 3 Iran-US Claims Tribunal Reports [Grotius Cambridge 1984] 270 and *ibid* [*Concurring Opinion Judge Mosk*] 175–76). In *Schlegel Corp. v NICIC* however, the tribunal pointed to the specific circumstances of the case and to the particularly close relationship between the subcontractor Schlegel and the respondent to justify the awarding of compensation based on unjust enrichment (14 Iran-US Claims Tribunal Reports [Grotius Cambridge 1988] 176, 180–82, 187–89).

**25** In some cases, the tribunal rejected claims for lack of actual enrichment. For instance, in *Flexi-Van Leasing, Inc. v Iran* (12 Iran-US Claims Tribunal Reports [Grotius Cambridge 1988] 335, 352–56, 363–64, 375–80), the tribunal rejected an unjust enrichment claim on the ground that the enrichment had not been proved. In *Shannon and Wilson, Inc. v Atomic Energy Organization of Iran* (9 Iran-US Claims Tribunal Reports [Grotius Cambridge 1987] 397, 403), the tribunal rejected the claim of unjust enrichment for lack of proof either that the respondent had been enriched or that any such enrichment was unjust. Also in other cases the tribunal denied claims to unjust enrichment either because the equipment had never reached the respondent (*Morgan Equipment Co. v Iran* 4 Iran-US Claims Tribunal Reports [Grotius Cambridge 1985] 272, 278–79) or because it could not be identified how the respondent had been unjustly enriched (*Electronic Systems International, Inc. v The Ministry of Defence of the Islamic Republic of Iran* 22 Iran-US Claims Tribunal Reports [Grotius Cambridge 1990] 339, 354).

**26** Furthermore, claims to unjust enrichment were denied on the ground that the services rendered were neither requested nor accepted by the respondent (*Reliance Group v Oil Services Company of Iran* 16 Iran-US Claims Tribunal Reports [Grotius Cambridge 1988] 257, 272), or because the claimant had made no attempt to recover funds prior to the start of the proceedings (*Phibro Corp. v Ministry of War-ETKA Co. Ltd* 26 Iran-US Claims Tribunal Reports [Grotius Cambridge 1992] 15, 26–27). In *Lockheed Corp. v Iran*, the tribunal rejected a claim to unjust enrichment when services were delivered after the termination of the contract on the ground that any benefits which may have been received by the Iranian Air Force were conferred by Lockheed at its own peril (18 Iran-US Claims Tribunal Reports [Grotius Cambridge 1989] 292, 309–10; see, however, *ibid* [Concurring Opinion Judge Aldrich] 323–24).

## **D. Special Legal Problems**

### **1. Subsidiarity of Unjust Enrichment**

**27** An important characteristic of any claim based on unjust enrichment is its subsidiary nature. A claim can be based on this doctrine only if no claim based on contract or on an illegal act may be brought. Such an express or implied rule of subsidiarity for claims based on unjust enrichment is generally accepted in domestic legal systems.

#### **(a) Subsidiarity in Respect of Contract Claims**

**28** One reason against allowing a claim based on unjust enrichment in the face of a contract is that such a contract will almost invariably afford a ‘just cause’ and would be the exclusive basis for the rights and remedies of the parties. International arbitral practice overwhelmingly supports the opinion that a claim based on unjust enrichment can only be pursued in the absence of a claim based on a contract. In the *Lighthouses Arbitration* (*Lighthouses Arbitration* [1956] 12 RIAA 155, 209) the Permanent Court of Arbitration (PCA) dismissed a claim based on unjust enrichment for the repair of a lighthouse since it was part of the normal obligations under a contract. Therefore there was a just cause. The Iran-US Claims Tribunal has also consistently adhered to the view that unjust enrichment may not be pleaded if a contract exists. The theory of unjust enrichment is one of last resort, and the tribunal has noted that ‘such a claim may not be maintained when a valid and enforceable contract exists’ (*Consortium for International Development [‘CID’] v Iran* 26 Iran-US Claims Tribunal Reports [Grotius Cambridge 1992] 244, 251). Accordingly, in *Dames and Moore v Iran*, the tribunal held that it had no jurisdiction over an alternative claim based on *quantum meruit* in a case where the principal claim based on contract was dismissed for lack of jurisdiction of the tribunal (4 Iran-US Claims Tribunal Reports [Grotius Cambridge 1985] 212, 220–21, 231–32; see also *TCSB Inc. v Iran* 5 Iran-US Claims Tribunal Reports [Grotius Cambridge 1985] 160, 171–72). Also in other decisions the tribunal held that the existence of a contract disposed of any claim for unjust enrichment and that a substitute right of action based on unjust enrichment did not arise

(*Component Builders, Inc. v Iran* [Interim and Interlocutory Award] 8 Iran-US Claims Tribunal Reports [Grotius Cambridge 1987] 216, 223–24; *Aeronutronic Overseas Services, Inc. v Iran* 11 Iran-US Claims Tribunal Reports [Grotius Cambridge 1988] 223, 238; *Futura Trading, Inc. v NIOC* 13 Iran-US Claims Tribunal Reports [Grotius Cambridge 1988] 99, 100–2, 113–17, 120–21).

**29** In other cases the tribunal either emphasized that there was no direct contractual link between the parties to the case before examining the question of unjust enrichment (*Flexi-Van Leasing, Inc. v Iran* 12 Iran-US Claims Tribunal Reports [Grotius Cambridge 1988] 335, 353; see also *ibid* [Concurring Opinion Judge Ameli] 364, 379; *Schlegel* 14 Iran-US Claims Tribunal Reports [Grotius Cambridge 1988] 176, 180–82; *Alfred Haber v Iran* 23 Iran-US Claims Tribunal Reports [Grotius Cambridge 1991] 133, 146–47) or disposed of contractual claims before proceeding to the question of unjust enrichment (*Sea-Land* 6 Iran-US Claims Tribunal Reports [Grotius Cambridge 1986] 149; *Shannon & Wilson Inc. v AEOI* 9 Iran-US Claims Tribunal Reports [Grotius Cambridge 1987] 397). Judge Brower found that the tribunal applied unjust enrichment as a remedy of last resort after ‘having found all other theories of recovery to be unavailable’ (Brower and Brueschke 57). From all these authorities it is abundantly clear that a claim based on unjust enrichment cannot be put forward as an alternative to a claim based on a contract.

### **(b) Subsidiarity in Respect of Damages Arising out of Internationally Wrongful Acts**

**30** The rule of subsidiarity applies also with regard to claims for damages in case of internationally wrongful acts. The remedies for an internationally wrongful act and for unjust enrichment are mutually exclusive. A remedy for unjust enrichment is available only where no other remedies, and in particular no claim to damages for a wrongful act, are available.

**31** As held by the Iran-US Claims Tribunal in *Sea-Land*:

[Unjust enrichment] involves a duty to compensate which is entirely reconcilable with the absence of any inherent unlawfulness of the acts in question. Thus the principle finds an obvious field of application in cases where a foreign investor has sustained a loss whereby another party has been enriched, but which does not arise out of an internationally unlawful act which would found a claim for damages (*Sea-Land* 6 Iran-US Claims Tribunal Reports [Grotius Cambridge 1986] 149, 169)

**32** Not only are restitution in the law of State responsibility and unjust enrichment conceptually different. The methods of achieving the desired result are also different. Where a remedy for unjust enrichment is granted, the starting point is the wealth accretion that remains in the hand of the respondent; under the law of State responsibility, it is the loss suffered by the claimant. In *Azurix v the Argentine Republic* (Award of 14 July 2006, ICSID Case No ARB/01/12 para. 436 <<http://icsid.worldbank.org/ICSID/FrontServlet>> [5 August 2008]), the International Centre for Settlement of Investment Disputes Tribunal (‘ICSID Tribunal’; see also International Centre for Settlement of Investment Disputes [ICSID]) referred to the ‘conceptually distinct’ nature of damages and unjust enrichment in terms of liability and the measure of restitution and declined reliance on unjust enrichment in case of a breach of treaty (*ibid* paras 434–38).

**33** Thus, international arbitral tribunals have rejected reliance on unjust enrichment as method for the calculation of damages in cases of unlawful expropriations or other breaches of international standards such as fair and equitable treatment (see *ADC Affiliate Ltd v Hungary* [Award of 2 October 2006] ICSID Case No ARB/03/16 para. 500 <<http://icsid.worldbank.org/ICSID/FrontServlet>> [5 August 2008]; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic* [Award of 22 May 2007] ICSID Case No ARB/01/3 para. 382 <<http://icsid.worldbank.org/ICSID/FrontServlet>> [5 August 2008]; *Azurix v the Argentine Republic* paras 434–38; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador* [Award of 5 October 2012] ICSID Case No ARB/06/11 paras 600, 653–57). A rare decision to the contrary is the

Lena Goldfields Arbitration (*Lena Goldfields Arbitration* [3 Sept 1930] *The Times* 7; *ibid* [1929–30] 5 AnnDig 3) which treats damages for breach of contract and restitution for unjust enrichment as equivalent choices. The decision has been severely criticized and must be dismissed as not authoritative.

## 2. Denial of Unjust Enrichment for Lack of Identity of Enriched Entity and Respondent

**34** The legal identity of the enriched entity and the respondent is crucial in unjust enrichment cases. Tribunals have rejected claims based on unjust enrichment because they considered the potentially enriched entity as legally different from the respondent. In *Amco Asia Corp. and others v Republic of Indonesia* an ICSID Tribunal rejected a claim to unjust enrichment after the revocation of a contract. The tribunal found that there had not been any enrichment on the part of the Indonesian government. The tribunal held that the company (PT Wisma) which had received the benefits was to be considered distinct from the Indonesian government despite the fact that PT Wisma's largest shareholder was a cooperative in the sphere of the Indonesian army (*Amco Asia Corp. and others v Republic of Indonesia [Resubmitted Case: Award of 5 June 1990]* ICSID Case No ARB/81/1 [1990] 1 ICSID Reports 569, 607–8). Also in an UNCITRAL case, *Saluka BV (The Netherlands) v Czech Republic*, the tribunal held that the bank Ceskoslovenská obchodní banka a.s. ('CSOB') was a legal entity which was distinct from its shareholders—the Czech State being a minority shareholder—and anything acquired by CSOB was therefore not acquired by the respondent. On this basis the tribunal denied reliance on unjust enrichment for lack of actual enrichment of the respondent (*Saluka BV [The Netherlands] v Czech Republic [Partial Award of 17 March 2006]* paras 448–56, 502 <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1149](http://www.pca-cpa.org/showpage.asp?pag_id=1149)> [6 August 2008]).

## 3. Exclusion of Unjust Enrichment in Cases of Wrongful Conduct by the Claimant

**35** A comparative analysis reveals that in common as well as in civil law systems (France, Germany, United Kingdom, US) illegality or immorality work as a defence to defeat a claim in unjust enrichment (see, however, *International Chamber of Commerce Award No 2930* (1982) IX YBCA 105, 107 et seq). As stated by a scholar:

As a defence, illegality implies that the plaintiff's own illegal or immoral conduct can defeat a claim in unjust enrichment which would otherwise lie....There is, interestingly, no divide between common law and civil law as regards the illegality defence. This has largely to do with the fact that this defence can be traced back to Roman law in all legal systems under consideration (Dannemann 310).

**36** Also at the international plane it seems firmly established that the principle of good faith precludes the invocation of unjust enrichment in a situation that has been brought about by the claimant's wrongdoing. In arbitral cases, when bribery (Corruption, Fight against) was established, tribunals have held that parties could not require performance of the contract nor seek restitution under it. This practice is based on the principle '*nemo auditur propriam turpitudinem suam allegans*' ('no one will be heard relying on his own turpitude'). Arbitrators will either decline jurisdiction or will deny a remedy such as restitution in cases of contracts tainted by fraud or corruption (see, eg, *International Chamber of Commerce Award No 1110* [1963] XXI YBCA 47; *International Chamber of Commerce Award No 3913* [1981] 111 Clunet 920; *International Chamber of Commerce Award No 6497* [1994] XXIV YBCA 71; *World Duty Free Company Limited v The Republic of Kenya [Award of 4 October 2006]* ICSID Case No ARB/00/7 paras 179–87). Also claims arising out of contracts which are tainted by illegal practices are generally dismissed on jurisdictional grounds with reference to the *nemo auditur* principle (see eg *Inceysa Vallisoletana*

*SL v Republic of El Salvador* [Award of 2 August 2006] ICSID Case No ARB/03/26 paras 338–39; *Plama Consortium Ltd v Republic of Bulgaria* [Award of 27 August 2008] ICSID Case No ARB/03/24 para. 143; *Philippine International Air Terminals Co, Inc v the Philippines* [Partial Award of 22 July 2010] paras 568–90).

**37** Accordingly, in a situation involving corruption or which is otherwise tainted by illegal practices neither a contract claim nor a claim based on unjust enrichment should succeed. The only possible exception to this principle may be a situation where the fraud or corruption had obviously not influenced the conclusion and performance of the contract (see *Société d'Investigation de Recherche et d'Exploitation Minière [SIREXM] v Burkina Faso* [Award of 19 January 2000] ICSID Case No ARB/97/1 <<http://icsid.worldbank.org/ICSID/FrontServlet>> [5 August 2008]). Otherwise it seems safe to conclude that the principle '*nemo auditur propriam turpitudinem suam allegans*' appears to be firmly rooted in international practice and is applicable as a defence to a claim to unjust enrichment.

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The English law of unjust enrichment is part of the English law of obligations, along with the law of contract, tort, and trusts. The law of unjust enrichment deals with circumstances in which one person is required to make restitution of a benefit acquired at the expense of another in circumstances which are unjust. The modern law of unjust enrichment encompasses what was once known as the law of quasi-contract. Its precise scope remains a matter of controversy. Beyond quasi-contract, it is sometimes UNJUST ENRICHMENT Ernest J Weinrib\*. 1. The Theoretical Challenge. "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." In the past few decades, this principle of liability has recently become as firmly established in the common law jurisdictions as it has long been among civil law systems. Being a relatively new basis of liability, unjust enrichment is now the most dynamic of all areas of private law. Nonetheless, skeptical voices have continued to be heard. "Unjust enrichment" may occur any time one party profits at the expense of another party. While state laws may vary, unjust enrichment usually refers to benefits that are received passively, accidentally, or by mistake. In general, unjust enrichment is considered to be unfair, and laws require a party that has been unjustly enriched to pay restitution to the other party. For example, suppose a person enters into a contract with an auto body shop to paint two of their cars. Unjust enrichment. Quite the same Wikipedia. Just better. In contract law, unjust enrichment occurs when one person is enriched at the expense of another in circumstances that the law sees as unjust.[1] Where an individual is unjustly enriched, the law imposes an obligation upon the recipient to make restitution, subject to defences such as change of position. Liability for an unjust (or unjustified) enrichment arises irrespective of wrongdoing on the part of the recipient. Unjust enrichment has three elements. First, the plaintiff must have provided the defendant with something of value while expecting compensation in return. Second, the defendant must have acknowledged, accepted, and benefited from whatever the plaintiff provided. Third, the plaintiff must show that it would be inequitable or Unconscionable for the defendant to enjoy the benefit of the plaintiff's actions without paying for it.